In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-916

WILLIAM MARRAPESE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-917

NICHOLAS ZINNI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that conversations obtained by means of a transmitting device placed on an informant were improperly admitted into evidence and that no overt act in furtherance of the conspiracy was proven.

After a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of conspiracy to deal in stolen firearms, in violation of 18 U.S.C. 371. Marrapese was sentenced to three years' imprisonment and Zinni was sentenced

to eighteen months' imprisonment. The court of appeals affirmed both convictions (Pet. App. 13-18).[1]

The evidence is set forth in the opinion of the court of appeals (Pet. App. 15-16). Briefly, it showed that on November 21, 1971, thirty machine guns were stolen from a national guard armory. In January, 1972, twenty-nine of the guns were found by government agents wrapped in plastic and submerged in a quarry in Oneco, Connecticut. Daniel Lapolla, who lived nearby, later became an informant.[2] A few hours after the theft, a telephone call was placed at 6:34 a.m. from Zinni's residence to Lapolla's residence. The day after the theft, a telephone call was placed from Marrapese's residence to Lapolla's residence. On March 31, 1972, both petitioners, unaware that the guns were no longer in the quarry, talked to Lapolla about a possible sale of the guns. Lapolla had allowed himself to be equipped with a radio transmitter, and the tapes and transcript of the conversation were introduced into evidence. The transcript of the conversation appears in the court of appeals opinion at Pet. App. 15-16, n. 2.

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[1]The pagination is the same in both petitions.

[2]Lapolla died shortly after it was disclosed that he was a government informant when a dynamite explosion ripped through his home as he was about to enter the front door. He was the government's chief grand jury witness and was to have testified at trial (Pet. App. 20). Lapolla's death was not disclosed to the jury.

1. Petitioners contend that the evidence of the monitored conversation should not have been admitted into evidence because the government agents had not obtained a warrant. However, where a government informant consents to wear a transmitter, agents do not need a warrant in order to receive conversations between the informant and other persons, *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293.[3] The government agent testified that Lapolla voluntarily consented to wear the transmitter; no testimony on this issue was taken since it was not raised before the trial and Lapolla was dead when the trial began.

Petitioners suggest that even if the evidence was admissible, it was admissible only as corroboration and not as part of the government's case-in-chief. Petitioners present no argument in support of this proposition. The tape and transcript were properly qualified (Pet. App. 21-23); there is no reason why they should not have been used in the government's case-in-chief, especially since the informant was unavailable.

2. Petitioners contend that no overt act in furtherance of the conspiracy was proven. Although the first two overt acts charged in the indictment were not proven, the substance of the third act was proven. The third

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[3]Petitioners apparently recognize that this is the current state of the law, and suggest that this Court reconsider its rulings so holding (Pet. 6). They do not establish any need for such reconsideration.

act charged was that two named individuals (not petitioners) dumped the weapons into the quarry, and the government proved that the weapons were dumped into the quarry (Pet. App. 27).

Petitioners seem to argue that because the government failed to prove the identity of the individuals who concealed the weapons, the government proved a different act than that charged in the indictment. This characterization is erroneous; the real question is whether the evidence was sufficient to prove the act charged. As the trial court found, the concealment of the guns was independently proven, and the connection of petitioners with that concealment was shown by the taped conversation (Pet. App. 27-28). The fact that the government did not prove that the guns were buried by the persons named in the indictment is of no moment because, as both courts below found, the essential element of the overt act charged was proven. (Pet. App. 17, 28).

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

DOJ-1974-03